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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

June 23, 2015
10:06 AM

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

(Doc. No. 7785) Status Conference in Follow-Up to Motion for
Relief from Stay Filed by Ronald Gillis.

Doc #8588, 8746, 8767 Hearing RE: Eighty-Seventh Omnibus
Objection to Claims (I) No-Liability Borrower Claims, (II)
Reduce and Allow Borrower Claims, (III) Redesignate, Reduce and
Allow Borrower Claims. (Related Document(s) 8588, 8746)

(CC: Doc. No. 8502, 8727) Adjourned Hearing RE: ResCap
Borrower Claims Trust's Objection to Amended Claim No. 4445
Filed by Alan Moss Filed by Norman Scott Rosenbaum on Behalf of
ResCap Borrower Claims Trust.

(Doc. No. 8567, 8566, 7552, 8127, 8334, 8502) Hearing Regarding
Discovery Dispute between Alan Moss and the ResCap Liquidating
Trust.

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A P P E A R A N C E S :

MORRISON & FOERSTER LLP

Attorneys for ResCap Borrower Claims Trust
250 West 55th Street
New York, NY 10019

BY: JORDAN A. WISHNEW, ESQ.
NORMAN S. ROSENBAUM, ESQ.

ALSO PRESENT:

RONALD GILLIS, Party Pro Se (TELEPHONICALLY)
JOYCELYN W. UNCIANO, Party Pro Se (TELEPHONICALLY)
ALAN I. MOSS, Party Pro Se (TELEPHONICALLY)

1 P R O C E E D I N G S

2 THE COURT: All right, please be seated. We're here
3 in Residential Capital, number 12-12020. Mr. Rosenbaum?

4 MR. ROSENBAUM: Good morning, Your Honor. Norm
5 Rosenbaum for the ResCap Liquidating Trust. Your Honor, the
6 first matter on the agenda is at page 10. It's Roman numeral
7 (III); it's the status conference on the amended motion for
8 relief from automatic stay by Mr. Gillis. I believe Mr. Gillis
9 is on the phone.

10 THE COURT: Okay, Mr. Gillis, are you on the phone?

11 MR. GILLIS: Yes, sir, this is Ron Gillis.

12 THE COURT: Thank you very much.

13 Go ahead, Mr. Rosenbaum.

14 MR. ROSENBAUM: As Your Honor may recall, this matter
15 came about because of a motion for relief from the automatic
16 stay that Mr. Gillis filed. It was opposed by the debtors.
17 Your Honor, heard the motion at a hearing on March 12th,
18 following which Your Honor entered an order dated April 24th
19 denying the motion.

20 At the hearing on the motion, Your Honor directed the
21 Liquidating Trust to search its files and produce documents to
22 Mr. Gillis related to his loan. Following the hearing, Your
23 Honor, we undertook -- the ResCap Liquidating Trust undertook a
24 review of its electronic records. They have methods for doing
25 so. They use the borrower name, address, loan number. As we

1 had advised both Mr. Gillis and the Court, Residential Funding
2 Company only acted as master servicer here, so our information
3 would be limited.

4 We produced all the documentation that we could locate
5 in our files to Mr. Gillis, and thereafter filed a status
6 report with the Court, as directed at the hearing on the
7 matter.

8 Thereafter, what ensued was a series of correspondence
9 between Morrison & Foerster and Mr. Gillis. I think Mr. Gillis
10 had issues about the completeness of the production. There was
11 some confusion about potentially another mortgage being an
12 issue, and that was the subject of the correspondence as well.

13 Eventually, Mr. Gillis filed a pleading indicating he
14 was raising Rule 11 issues, and we asked for this status
15 conference. We believe that we have, as directed, diligently
16 reviewed the files and produced everything we could locate.
17 Again, it's a limited forum of documents.

18 I would note that Mr. Gillis is requesting this
19 information in connection with a pending federal lawsuit that
20 was dismissed. We provided a copy of that order to Your Honor.
21 I don't know if Mr. Gillis has appealed that order or not.

22 THE COURT: Anything else, Mr. Rosenbaum?

23 MR. ROSENBAUM: No, Your Honor.

24 THE COURT: Mr. Gillis.

25 MR. GILLIS: Good morning, Your Honor. Yes, this Ron

1 Gillis. Most of what he said there was correct. However, as
2 he did say, I am saying that he clearly is not producing all
3 the information.

4 One of the documents that was produced in the state
5 case was a purported note which has endorsements to and from
6 Residential Funding Corporation. Mr. Rosenbaum produced no
7 documentation of the purchase and sale of said document.

8 In addition to that, there is a pending motion, again,
9 in the state court, to transfer this to a Residential Credit
10 Loan Bank entity, which again, is part of your case up there in
11 the bankruptcy court. And I have researched your case as best
12 I could, and I could not find any listing where they show this
13 as an asset or pending litigation. And again, if they're
14 transferring this supposed asset to the trust, which would be
15 in your bankruptcy, that should have -- documentation of that
16 should have been produced as well.

17 I produced e-mails. And Mr. Rosenbaum is trying to
18 state that it was confusing regarding the e-mails. I can
19 assure you that the e-mails were pertaining to this same case,
20 same issue. However, I would also add to that, that if this
21 was another loan, which it is not -- but if it was -- the
22 e-mails discuss underwriting and such, and none of that was
23 produced by him either. So again, whether he's deliberately
24 withholding or somebody else is withholding, either instance is
25 not acceptable.

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1 I also have one --

2 THE COURT: Mr. Gillis --

3 MR. GILLIS: -- I don't know if you --

4 THE COURT: -- Mr. Gillis --

5 MR. GILLIS: Yes.

6 THE COURT: -- you cannot simply allege that someone
7 has purposely withheld documents. Do you have any basis -- I
8 mean, you've gotten documents from them. You believe that the
9 documents produced are incomplete.

10 MR. GILLIS: Right.

11 THE COURT: But you cannot simply allege wrongdoing on
12 the part of an attorney unless -- do you have something to back
13 that up?

14 MR. GILLIS: Well, as I submitted the -- my own status
15 update, the note and mortgage submitted in the foreclosure case
16 has endorsements to and from Residential Funding Corporation.
17 And Mr. Rosenbaum produced no such documentation. I don't know
18 that he's doing it, but it's either him or GMAC.

19 THE COURT: All right, go ahead, Mr. Gillis.

20 MR. GILLIS: I also had a question that in
21 the -- there should have been a repudiation order. I couldn't
22 find it in your records. But if it was, I would imagine it
23 would have been done in 2012. One of the documents he produced
24 to me states this Omar Yussef Kanyar (ph.) on 4/10 of '14 is
25 supposedly acting on behalf of Residential Credit Loans as

1 a -- I'm not sure exactly what his capacity is -- but if the
2 repudiation agreement was, in fact, done in 2012, it's
3 inappropriate to be exercising such documents on behalf of an
4 entity that was liquidated in December 11, 2013.

5 THE COURT: Mr. Rosenbaum, do you want to respond?

6 MR. ROSENBAUM: Well, Your Honor --

7 THE COURT: First, can you address the issue -- Mr.
8 Gillis indicates that there previously was provided or filed a
9 note with various endorsements on it, and he said you'd not
10 produced any documents for any of that. Can you address that?

11 MR. ROSENBAUM: Sure, Your Honor. My underst -- well,
12 I believe that the note with the endorsements on it was
13 produced either in the federal action or in the state
14 foreclosure action. It would have been produced by one of the
15 parties to that action. From what Mr. Gillis provided us, it
16 clearly provides the endorsement of RFC. RFC acquired and
17 securitized the loan. We provided the securitization documents
18 to Mr. Gillis as part of our production.

19 We did not have a copy of the endorsed note in
20 ResCap's files.

21 THE COURT: Do you have an explanation for that?

22 MR. ROSENBAUM: Well, the explanation I was told was
23 that what we would have is a copy of the origination file which
24 wouldn't have the endorsed note. The endorsed note would
25 be -- the original endorsed note with the endorsements would be

1 in the -- the original would be with the custodian. Apparently
2 it was, because it was produced in the litigation.

3 We, again, searched our records. I think we requested
4 at least twice, possibly three times, to go back and check for
5 anything else that could possibly be there when we started to
6 have this correspondence with Mr. Gillis. And we don't have a
7 copy or any other documentation relating to those endorsements.
8 We don't deny that the loan was endorsed, we just don't have
9 that copy.

10 MR. GILLIS: Your Honor, if it was endorsed, that
11 means they should have taken ownership and paid something for
12 it, and then when they sold it, there should be something
13 selling it.

14 THE COURT: It doesn't necessarily mean that, Mr.
15 Gillis.

16 MR. GILLIS: I'm sorry?

17 THE COURT: It doesn't necessarily mean that, Mr.
18 Gillis. You're making a leap -- an assumption that isn't
19 necessarily accurate.

20 MR. GILLIS: Well -- well, they still never produced
21 anything --

22 THE COURT: Can you explain, Mr. Rosenbaum --

23 MR. GILLIS: -- regarding that --

24 THE COURT: Stop.

25 Mr. Rosenbaum, can you explain, was there

1 consideration paid or received in connection with the
2 endorsements to the note?

3 MR. ROSENBAUM: I believe there is the securitization
4 process acting as the -- acting in that capacity and as a
5 serve -- and as part of that process, I think, they received --

6 THE COURT: All right, let me --

7 MR. ROSENBAUM: -- RFC as master servicer receives
8 fees as part of the process. We're not denying that the note
9 was endorsed, we just don't have a copy in our -- we weren't
10 able to locate that copy in our files. This goes back to 2006.
11 And as we've indicated before, we weren't the servicer of this
12 loan.

13 THE COURT: Okay. All right. Let me ask, does either
14 side wish to file an additional memorandum of law addressing
15 the issues raised by the amended motion for relief from the
16 automatic stay before the Court decides the matter? Mr.
17 Rosenbaum?

18 MR. ROSENBAUM: No, Your Honor.

19 THE COURT: Mr. Gillis?

20 MR. GILLIS: I'm sorry, what was that?

21 THE COURT: My question is, do you wish to file an
22 additional memorandum of law addressing the issues in your
23 amended motion for relief from the automatic stay, before the
24 Court goes ahead and decides the matter? I'm not deciding it
25 from the bench today, but I want to know whether -- I mean,

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1 I've got this long list of stuff that's been exchanged and
2 issues that each of you have raised today, and before I go
3 ahead and decide the matter, I want to know whether you wish to
4 file an additional memorandum of law?

5 MR. GILLIS: Did Mr. Rosenbaum state he would be?

6 THE COURT: He said he would not. He said he did not
7 wish to.

8 MR. GILLIS: Okay, then I will leave it at that, then,
9 as well.

10 THE COURT: Okay. So what I'm going to do is take the
11 matter under submission. The matter will be decided based on
12 those filings that have taken place until now, and an order
13 will issue in due course.

14 MR. ROSENBAUM: Thank you, Your Honor.

15 THE COURT: All right? Thank you very much, Mr.
16 Gillis.

17 MR. GILLIS: Thank you.

18 THE COURT: All right, Mr. Gillis, you're welcome to
19 stay on the phone or excuse yourself; whichever you prefer.

20 MR. ROSENBAUM: I'll cede the podium --

21 MR. GILLIS: I'm going to --

22 MR. ROSENBAUM: -- to Mr. Wishnew, Your Honor.

23 MR. GILLIS: -- go on with my day, thank you very much.

24 THE COURT: Okay, Mr. Gillis. Thank you very much.

25 Let me just make a note before you --

1 (Pause)

2 THE COURT: All right, Mr. Wishnew.

3 MR. WISHNEW: Thank you, Your Honor. Good morning.

4 Jordan Wishnew, Morrison & Foerster for the ResCap Borrower
5 Claims Trust.

6 Your Honor, the next matter on today's agenda is under
7 Roman numeral (IV) on page 11. It is the ResCap Borrower
8 Claims Trust's eighty-seventh omnibus objection to claims,
9 concerning no liability borrower claims, a reduce and allow
10 borrower claim, and a redesignate, reduce and allow borrower
11 claim.

12 Your Honor, there are seventeen claims at issue in
13 this omnibus objection. We have adjourned one matter: That is
14 the claim of Scott Leonhardt, claim number 5720 to the omnibus
15 hearing on July 16th. There has been one response filed by
16 Joycelyn Unciano. I believe she is on the phone today.

17 THE COURT: All right, Ms. Unciano, are you on the
18 phone?

19 MS. UNCIANO: Yes, good morning, Your Honor.

20 THE COURT: Good morning.

21 MS. UNCIANO: Yes, Joycelyn Unciano here.

22 THE COURT: Okay, all right. Go ahead, Mr. Wishnew.

23 And Ms. Unciano, I'll give you a chance to address the
24 Court after Mr. Rosenbaum (sic) is done, okay?

25 MS. UNCIANO: Okay, thank you.

1 THE COURT: Go ahead.

2 MR. WISHNEW: And so through -- putting aside those
3 two claims, Your Honor, we seek to expunge thirteen uncontested
4 no-liability claims and reduce and allow one claim, and then
5 redesignate, reduce and allow another claim. For the
6 reasons -- besides for our correspondence with Mr. Leonhardt
7 and Ms. Unciano, we've received no other responses to the
8 claims set forth for today.

9 THE COURT: All right, let me deal with it to this
10 extent.

11 So pending before the Court is the ResCap Borrower
12 Claims Trust's eighty-seventh omnibus objection to claims.
13 It's filed as ECF docket number 8588. And the objection is
14 supported by the declarations of Kathy Priore, which is Exhibit
15 2 to the objection, and Norman Rosenbaum, which is Exhibit 3 to
16 the objection.

17 The objection is sustained with respect to all of the
18 claims except for Unciano and -- remind me -- the one that
19 you're adjourning.

20 MR. WISHNEW: Scott James Leonhardt, claim 5720.

21 THE COURT: Okay. So the objection is sustained as to
22 all of the others. You can present a separate order sustaining
23 those objections for the reasons set forth in the papers. The
24 Court's reviewed it and finds the objection is well taken.

25 MR. WISHNEW: Thank you very much, Your Honor.

1 THE COURT: Okay. So let's move on. Let's deal with
2 the Unciano claim.

3 MR. WISHNEW: Absolutely, Your Honor.

4 THE COURT: Okay?

5 MR. WISHNEW: Your Honor, the basis for the Borrower
6 Trust seeking to disallow Ms. Unciano's claim is res judicata.
7 Attached to Ms. Unciano's claim is a pre-petition federal
8 lawsuit in which she brought a variety of different claims
9 against the debtors. That matter has been fully litigated
10 through the federal courts. It was originally in the federal
11 district courts; it was then -- she then sought a motion for
12 reconsideration that was denied. And then she took the appeal
13 up to the Ninth Circuit. That was also denied, Your Honor.

14 It is our -- since -- we believe the facts really are
15 fairly straightforward. She attached the underlying complaint.
16 The complaint was fully litigated. She can't come before this
17 Court and try and relitigate matters that have already been
18 fully adjudicated by other courts.

19 THE COURT: Let me just see -- ask you a couple of
20 questions. Do you agree, Mr. Wishnew, that Ms. Unciano's
21 claims were all Hawaii state law claims?

22 MR. WISHNEW: I believe, for the most part, that's
23 correct, Your Honor.

24 THE COURT: Here's the reason I'm asking. You assert
25 that res judicata applies here --

1 MR. WISHNEW: Um-hum.

2 THE COURT: -- and to the extent that the claims
3 asserted are Hawaii state law claims --

4 MR. WISHNEW: Um-hum.

5 THE COURT: -- do you agree that the Court would look
6 to the law of Hawaii, state law of Hawaii for the application
7 of res judicata?

8 MR. WISHNEW: I would agree, Your Honor.

9 THE COURT: All right. So let me ask again; point out
10 if I'm wrong. It seemed to me that the claims that are
11 asserted are Hawaii state law claims; are there any federal
12 claims that were asserted?

13 MR. WISHNEW: One moment, Your Honor, I just wanted to
14 look back to the --

15 THE COURT: Because my understanding is the first
16 amended complaint asserted causes of action for injunctive
17 relief, declaratory judgment, unfair and deceptive trade
18 practices, violation of the Hawaii Debt Collection Act,
19 intentional infliction of emotional distress, fraudulent
20 misrepresentation, negligent misrepresentation, abuse of
21 process and civil conspiracy.

22 MR. WISHNEW: That is correct, Your Honor. I'm
23 looking --

24 THE COURT: And those all seem to be Hawaii state law
25 claims.

1 MR. WISHNEW: I would agree with you, Your Honor.

2 THE COURT: All right. At the end of the day, I'm not
3 sure whether or not it would make a difference, but to the
4 extent that they're Hawaii state law claims, the Court would
5 apply the Hawaii rules with respect to res judicata, even
6 though it was a federal court that adjudicated the claims,
7 correct?

8 MR. WISHNEW: That's correct, Your Honor.

9 THE COURT: Okay. And as I understand your position,
10 you believe that these claims were fully adjudicated in the
11 district court, Ms. Unciano appealed, the district court
12 decision was affirmed on appeal, no further appellate review
13 was sought.

14 MR. WISHNEW: Correct, Your Honor.

15 THE COURT: Okay. So what effect, if any, does the
16 decision -- the -- I guess it's the Hawaii Land Court have?

17 MR. WISHNEW: Your Honor, I don't believe it has any
18 effect here.

19 THE COURT: Tell me why.

20 MR. WISHNEW: Because the fact of the matter is it
21 was -- the decision of the Hawaii Land Court relates to a
22 separate litigation. So there was a -- from a procedural
23 standpoint, there was a foreclosure proceeding started in 2003.
24 There was a nonjudicial foreclosure proceeding started in 2010,
25 and quickly dismissed three months later. The Land Court

1 decision is a part of the pre-existing state judicial
2 foreclosure proceeding. What is at issue in the claim is the
3 affirmative claims of Ms. Unciano against the debtors in a
4 federal court of action. And the fact of the matter is, to the
5 extent Ms. Unciano had similar issues, she could have raised
6 those issues through the federal court action. That matter has
7 already been addressed, so there really is no way to try and
8 reopen it to bring in the Land Court decision.

9 THE COURT: So on June 30th, 2014, the Hawaii
10 Intermediate Court of Appeals issued an order vacating the Land
11 Court order and determining that there was a dispute whether
12 GMACM is a valid owner of the mortgage, is that correct?

13 MR. WISHNEW: Correct, Your Honor.

14 THE COURT: So is -- when was the Ninth Circuit's
15 decision affirming the district court?

16 MR. WISHNEW: One moment, Your Honor.

17 THE COURT: I guess I can answer my own question:
18 December 18th, 2014.

19 MR. WISHNEW: Yeah, that's in paragraph 14 of our
20 reply --

21 THE COURT: Right.

22 MR. WISHNEW: -- on docket 8767.

23 THE COURT: So the most recent order is the Ninth
24 Circuit's decision affirming the district court?

25 MR. WISHNEW: Yes, Your Honor.

1 THE COURT: Did the district court decide whether GMAC
2 was the owner of the mortgage?

3 MR. WISHNEW: No, Your Honor. I think that was the
4 subject of the declaratory judgment count in the district court
5 action. And my recollection is that the district court
6 abstained on that point because there was a simultaneous state
7 court action. So that state court action, to my knowledge, is
8 still open. Ms. Unciano still has her rights, but those rights
9 are not preserved. The fact -- I'm sorry; let me take that
10 back. Ms. Unciano does not assert any monetary counterclaims
11 against GMAC or against any debtor in the state court action,
12 and she hasn't preserved any such claims through a proof of
13 claim either.

14 THE COURT: Okay. All right. Anything else you want
15 to add?

16 MR. WISHNEW: Nothing, Your Honor.

17 THE COURT: Ms. Unciano, go ahead.

18 MS. UNCIANO: Oh, yes, good morning, Your Honor.
19 First I wanted to set out the conflict in the paperwork that I
20 had submitted in my objection. And as far as Mr.
21 Rosenbaum -- that was him that was speaking?

22 THE COURT: It's actually Mr. Wishnew who was arguing,
23 but that's okay.

24 MS. UNCIANO: Oh, okay. Sorry.

25 THE COURT: No, that's okay.

1 MS. UNCIANO: Anyhow, he mentioned that --

2 THE COURT: It's one of his colleagues.

3 MS. UNCIANO: I'm sorry, pardon?

4 THE COURT: It's one of his -- Mr. Rosenbaum's
5 colleagues. Mr. Rosenbaum is in the courtroom as well.

6 MS. UNCIANO: Oh, okay.

7 THE COURT: But go ahead.

8 MS. UNCIANO: Okay. Okay. He did mention that the
9 judge abstained from a declaratory judgment as far as wanting
10 to rule on whether or not the assignment of mortgage to GMAC
11 was valid. But what they did was, GMAC, they went into the
12 Land Court, they had made a correction because they had the
13 wrong person -- the wrong lender. I'm sorry. Anyhow, GMAC
14 proceeded as the mortgagee of an alleged mortgage that they did
15 not hold in the nonjudicial. And then in the judicial side,
16 they proceeded, by way of Land Court, by doing a correction to
17 correct the invalid assignment, which is still invalid. And
18 that matter has been vacated by the Land Court in the State of
19 Hawaii, in the ICA.

20 THE COURT: May I ask you this?

21 MS. UNCIANO: So I feel --

22 THE COURT: Why doesn't --

23 MS. UNCIANO: Um-hum.

24 THE COURT: Why doesn't the decision of the federal
25 district court, affirmed by the Ninth Circuit, bar your damages

1 claim here because of res judicata?

2 MS. UNCIANO: They didn't adjust the assignment of
3 mortgage. What happened was I did send them a notice of the
4 ICA's ruling on the disposition as well as the judgment, but
5 they didn't take that into consideration at all and ruled
6 against -- against us anyway in the Ninth Circuit. They still
7 think that was the State of Hawaii ICA decision.

8 But I'm confused. I know that if someone takes --
9 tries to take something from me and I know that they shouldn't,
10 and they try to take it from me, I can call the police. I can
11 put in -- I can put in a report that says, hey, this guy's
12 trying to steal something from me. They'll go and investigate
13 and see if it's valid and they'll arrest that person if it is a
14 criminal act.

15 In this case, there's a judicial proceeding which I
16 have been filing that all of a sudden GMAC comes in, they try
17 to take it by way of nonjudicial. They forced me into circuit
18 court again to file another complaint to stop the auction one
19 day before it was about to happen or a few days before it was
20 about to happen. If I hadn't done that, they would have taken
21 the property.

22 THE COURT: May I ask you this?

23 MS. UNCIANO: But what the --

24 THE COURT: Are you still in possession of the
25 property?

1 MS. UNCIANO: Yes, I am now, because of the lien, yes.

2 THE COURT: Okay. And is --

3 MS. UNCIANO: But I had to leave the property for
4 about a year.

5 THE COURT: Is there -- is anyone seeking to foreclose
6 on the mortgage on the property now?

7 MS. UNCIANO: Not at this time, no. But you know, I
8 had to -- I had to move my family out; we were out for over a
9 year -- well, about a year. We had to pay for storage costs.
10 We had to pay for a moving fee. We had to pay for rent.
11 Anyway, it was -- it was astronomical, all the things that we
12 had to go through. I mean, if someone steals something and
13 they attempted to steal in a criminal court, you attempt to
14 steal it and you find that you did try to steal it, it's a
15 criminal offense.

16 THE COURT: May I ask --

17 MS. UNCIANO: Here --

18 THE COURT: -- you this? What were you seeking to
19 recover in your action in the district court? You were seeking
20 to recover damages, am I correct?

21 MS. UNCIANO: Yes. You know -- yes -- yes, damages.
22 Because of what had happened in the federal court and in the
23 circuit court, they succeeded in taking the property, and it
24 was ruled against them. So they not only did it once to me;
25 they did it twice to me. And I -- I'm really confused. How

1 can this happen?

2 THE COURT: Mr. Rosenbaum, let -- excuse me -- Mr.
3 Wishnew, do you agree that whatever I decide with respect to
4 the Unciano damages claim does not preclude her from asserting
5 a defense of -- with respect to the issue that the Land
6 Court -- that the appellate court and the state court decided?
7 Now, if --

8 MR. WISHNEW: Yes --

9 THE COURT: -- a foreclosure action proceeds --

10 MR. WISHNEW: Yes, Your Honor, I think that's
11 consistent with our supplemental servicing order --

12 THE COURT: Okay.

13 MR. WISHNEW: -- in this case as well.

14 THE COURT: Okay. So the only issue before me is
15 whether Ms. Unciano's damages claim against, now, the trust is
16 barred by res judicata. It does not -- if I rule in the
17 trust's favor, sustain the objection on the basis of res
18 judicata, you agree that it does not prevent or preclude Ms.
19 Unciano from asserting a defense to foreclosure, either an
20 affirmative claim that she asserts to enjoin any future
21 foreclosure; she's still permitted to do that?

22 MR. WISHNEW: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. WISHNEW: I believe the action would be prosecuted
25 by the current servicer, which is not any of the debtors at

1 this point in time.

2 THE COURT: Okay. All right. Anything else you want
3 to add, Ms. Unciano?

4 MS. UNCIANO: I couldn't hear what he said. I'm
5 sorry.

6 THE COURT: Okay. Mr. Wishnew, in substance, he
7 agreed that -- and I'm not ruling from the bench, but if I were
8 to sustain the trust's objection to your damages claim, it
9 would not prevent you from asserting your arguments as a
10 defense to any foreclosure, either because you bring an action
11 to enjoin foreclosure, if they try to go the nonjudicial
12 foreclosure route, or otherwise. In other words, my decision
13 on your damages claims, if it's based on res judicata from the
14 district court decision affirmed by the Ninth Circuit, doesn't
15 prevent you from asserting your same arguments that you've
16 already raised in the Land Court. That's the -- you agree with
17 that, Mr. Wishnew? That's the substance of what --

18 MR. WISHNEW: Correct, Your Honor.

19 THE COURT: Okay. Is there anything you wish to add,
20 Ms. Unciano?

21 MS. UNCIANO: Well, I can't think right now.

22 THE COURT: All right.

23 MS. UNCIANO: But maybe what you're saying is that
24 if -- if I wanted to -- if a foreclosure case comes forward, is
25 what you're saying, that it doesn't prevent me from raising

1 these issues?

2 THE COURT: That's correct.

3 MS. UNCIANO: In the foreclosure proceeding?

4 THE COURT: Yeah. All I have before me is the issue
5 of whether you can recover damages against the -- from the
6 trust.

7 MS. UNCIANO: Right.

8 THE COURT: You previously litigated that in the
9 district court action, and you lost there.

10 MS. UNCIANO: Right.

11 THE COURT: You appealed, and the decision of the
12 district court was affirmed.

13 MS. UNCIANO: Um-hum.

14 THE COURT: The trust argues that that requires this
15 Court to apply res judicata and bar your damages claim. I just
16 wanted to confirm with the trust's lawyer that it does not
17 affect an equitable argument that you would assert --

18 MS. UNCIANO: All right.

19 THE COURT: -- as a defense to any foreclosure, either
20 because you'd bring an action to enjoin foreclosure or -- okay?
21 That was the point I was trying to clarify with the trust
22 because the trust is -- none of the debtors service your loans,
23 so if someone's going to try to foreclose, it isn't going to be
24 GMAC or the debtors.

25 MS. UNCIANO: All right.

RESIDENTIAL CAPITAL, LLC, et al.

25

1 THE COURT: It would be the current servicer.

2 MS. UNCIANO: Um-hum.

3 THE COURT: Okay. I'm going to take the matter --

4 MS. UNCIANO: So the second part would --

5 THE COURT: I'm going to take the matter under
6 submission and we'll render a decision in due course.

7 Thank you very much, Ms. Unciano.

8 MS. UNCIANO: Thank you.

9 THE COURT: Okay.

10 MS. UNCIANO: Thank you.

11 THE COURT: All right, Mr. Wishnew?

12 MR. WISHNEW: Thank you, Your Honor. The next and
13 last matter on today's agenda is item 2 on page 12, the ResCap
14 Borrower Claims Trust objection to amended claim number 4445,
15 filed by Alan Moss. And Mr. Moss is on the phone today.

16 All right. Mr. Moss, are you on the phone?

17 MR. MOSS: I am, Your Honor.

18 THE COURT: Okay. Go ahead, Mr. Wishnew.

19 MR. WISHNEW: Thank you, Your Honor. Your Honor, Mr.
20 Moss' original claim was expunged without prejudice. That was
21 an order from the Court at docket number 8127. Your Honor
22 provided Mr. Moss with the opportunity to cure his pleading
23 deficiencies. He filed his amended claim. The borrower trust
24 then filed its objection on April 15th. Mr. Moss filed his
25 response on June 3rd, at docket 8727. The borrower trust filed

1 its reply on June 18th, 2015.

2 Your Honor, there really is one issue that's before
3 the Court today, and the question is, is has Mr. Moss' amended
4 claim sufficiently pled actual malice so as to -- or actual
5 malice by Executive Trustee Services so as to take it out of
6 the immunity exception or the privilege exception given to
7 trustees in California when addressing and servicing deeds of
8 trust.

9 It's our position that he has not alleged sufficient
10 substantive facts but really only alleged conclusory
11 allegations that are unsubstantiated. And given the fact that
12 he's not met his pleading burden, we'd ask that, similar to the
13 Court's prior ruling, this claim be expunged, but this time
14 with prejudice.

15 THE COURT: And your position is that Rule 9(b)
16 applies to a pleading of actual malice?

17 MR. WISHNEW: Yes, Your Honor, yes.

18 THE COURT: Let me see if I have any questions for
19 you.

20 All right. Let me hear from Mr. Moss.

21 Go ahead, Mr. Moss.

22 MR. MOSS: Excuse me. Thank you, Your Honor. I
23 believe I have met my burden. I've alleged malice, and in two
24 different ways. Firstly, by default. I believe that it is
25 uncontroverted that I pled malice and that the amended claim of

1 the original claim is based on the complaint that I filed in
2 San Mateo Superior Court here in California. And the
3 allegations of that complaint have to be taken as true
4 because --

5 THE COURT: Mr. Moss -- Mr. Moss, let me -- I
6 understand your argument about the default, but -- and I'm not
7 deciding it from the bench, but I want you to assume that
8 you're unsuccessful in your argument about default. No default
9 judgment was actually entered. And so I understand the
10 argument you're making; I'm not ruling on it now. But for
11 purposes of this discussion, I want you to assume that the
12 trust is not barred by virtue of the California proceeding.
13 Tell me why do you believe that your amended claim sufficiently
14 pleads actual malice.

15 MR. MOSS: All right. Because we -- well, if we
16 forget about the default and --

17 THE COURT: Yes, for the sake of this discussion,
18 forget about the default. No default judgment was ever
19 entered, Mr. Moss.

20 MR. MOSS: Okay. But I want to make sure that the
21 Court --

22 THE COURT: Mr. Moss, tell me why you believe the
23 amended claim adequately pleads actual malice. What's in the
24 amended claim that you believe satisfies the pleading
25 requirements for pleading actual malice?

1 MR. MOSS: Because that -- the standard for actual
2 malice is two prongs, and one of those prongs is that they had
3 no reasonable grounds for believing in the truth of what they
4 published. And in this case, as I have alleged in the amended
5 complaint, it is absolutely clear they had no grounds for any
6 belief. They took no action. They did no inquiry. They did
7 no due diligence. And it's clear under California law that
8 they have at least some obligation to ascertain that they had
9 the authority to move forward. And they didn't do anything.

10 And that's abundantly clear if, for no other reason,
11 from the fact that the trust had advanced no evidence, no
12 allegations, no anything that ETS did anything. They didn't
13 make a phone call. They didn't go online. They could have
14 ascertained whether or not they had authority in about two
15 minutes, the same way I did: by going online and looking at
16 just the recorded documents. And they haven't done it for five
17 years. And they -- they haven't done it for five years. They
18 could have done it initially. They were substituted in as
19 trustee -- or purportedly substituted in as trustee, I should
20 say, by an entity that nobody has ever even heard of, let alone
21 can be traced.

22 And under the recorded documents, they -- there was no
23 authority from this entity -- it wasn't ResCap that did it, it
24 wasn't GMAC that did it. It was something called TCIF that
25 weren't going to become the beneficiary for more than a year

1 after they purported to substitute in ETS as the
2 beneficiary -- as -- I'm sorry, as the trustee. So my position
3 is -- and I have alleged it, and I think adequately so, if I
4 may say so -- that a trustee in California is not a true
5 trustee, but he has absolute duty and obligations to both
6 parties, both to the beneficiary and to the trustor, my
7 pos -- I was the trustor. And they did nothing. They did
8 zero. They absolutely violated that duty.

9 They didn't make one inquiry. They didn't do
10 anything. They stonewalled forever. They didn't ask for a
11 subpoena. They did nothing. Absolutely nothing. And they did
12 it with someone -- I mean, I don't know what their argument --
13 I have no idea what they based it on or didn't base it on or
14 anything. What I do know and what is public, which is the only
15 thing I can know right now, is that they took no action. They
16 did nothing.

17 THE COURT: Let me ask you this, Mr. Moss.

18 MR. MOSS: And that, I believe, meets the second prong
19 of Kachlon because they could not have a reasonable belief,
20 because they couldn't have any belief.

21 THE COURT: So Kachlon -- Kachlon, which is Kachlon v.
22 Markowitz, 85 Cal.Rptr.3d 532. It's a Court of Appeals
23 2008 -- California Court of Appeals 2008, said that mere
24 negligence in making a sufficient inquiry into the facts on
25 which a publication was based is not sufficient to sustain a

1 claim for actual malice. You -- what authority -- so that's
2 the -- the trust relies on that. I can't find -- you didn't
3 allege -- you didn't argue specific authority to support your
4 argument that the trust had an affirmative duty to investigate
5 the chain of title. So what -- other than Kachlon, is
6 there -- do you have a case that supports your argument?

7 MR. MOSS: I think I do, Your Honor.

8 THE COURT: Well, tell me what it is.

9 MR. MOSS: All right. Just give me -- if you'll just
10 give me a minute.

11 I mean, in the first place, Kachlon is --provides that
12 standard. But in Kachlon, the trustee was actually legally
13 appointed. It wasn't an issue in the case.

14 THE COURT: Yes, I understand --

15 MR. MOSS: So the holding that --

16 THE COURT: -- your -- you try to distinguish -- you
17 make the argument that somehow this is different because -- you
18 try to place a burden on ETS to investigate the chain of title.
19 To me, your argument is not consistent with Kachlon. In
20 Kachlon, the Court also said, after being presented with
21 documentation showing that the underlying debt had been paid,
22 the trustee took no further action to enforce the foreclosure.
23 Nothing remotely suggests that the trustee acted with malice.

24 I -- what I'm having trouble with is seeing what the
25 legal basis for your argument that ETS had an affirmative duty

1 to go beyond what it did and how the absence of making the
2 investigation is sufficient to support a claim for actual
3 malice. Negligence doesn't suffice for you to be able to state
4 your affirmative claim. Actual malice is what's required, and
5 I don't see what -- what's the authority you're relying on to
6 support your claim? I mean, additionally, Ogilvie v. Select
7 Portfolio Servicing, 2012 WL 3010986, Northern District
8 California, July 23rd, 2012, it upheld -- it determined that
9 the plaintiff had not adequately pled malice by alleging that
10 "Defendants acted in malice and reckless disregard for the
11 truth when they formulated false documents."

12 That wasn't a sufficient allegation. I don't see how
13 you've done anything more than what's been rejected by courts
14 in other cases, and you have no cases that support your
15 position. Do you have a case that supports your position?

16 MR. MOSS: Well, there is an -- there is not a case
17 that I could find where an illegally substituted trustee, as a
18 basic fact of the case, was -- as opposed to Kachlon -- where
19 it was -- where the Court held that that was -- it didn't make
20 malice. I mean --

21 THE COURT: Okay, I understand your argument.
22 Anything else you want to add?

23 MR. MOSS: Well, there's nothing I want to add on that
24 point, no.

25 THE COURT: Well, that seems to be the central --

1 MR. MOSS: I just --

2 THE COURT: -- point of what this --

3 MR. MOSS: I guess I would --

4 THE COURT: -- what this is about. You were
5 given -- I granted you leave to amend, you amended, and the
6 issue is whether your amended claim sufficiently states a
7 claim. I take it you don't disagree that under applicable law
8 the issue is whether you've adequately pled actual malice. Do
9 you agree with that? That's the standard in --

10 MR. MOSS: Well, I --

11 THE COURT: -- the California law.

12 MR. MOSS: -- I agree that I have to plead -- I have
13 to claim malice.

14 THE COURT: You have to --

15 MR. MOSS: I have to do that --

16 THE COURT: -- plead actual malice. That's what
17 California substantive law requires for you to properly state a
18 claim. The issue before me today is whether your
19 amen -- because I granted you leave to amend. And the issue is
20 whether the amended claim adequately states actual malice. The
21 trust argues no, and you're arguing yes. That's what I have to
22 decide. Do you agree?

23 MR. MOSS: I agree within the parameters of
24 what -- what's in my response, which includes the default,
25 which I think it cannot be disputed now that I have pled actual

1 malice.

2 THE COURT: All right. I --

3 MR. MOSS: And even if --

4 THE COURT: All right. I'm going to take --

5 MR. MOSS: -- I've --

6 THE COURT: I've heard enough. I'm taking the matter
7 under submission. Thank you very much.

8 MR. WISHNEW: Thank you, Your Honor. That --

9 THE COURT: All right. That's it for the agenda?

10 MR. WISHNEW: That's it for today's agenda.

11 THE COURT: All right. We're going to take your
12 recess until 11 o'clock on the calendar.

13 MR. MOSS: Your Honor?

14 THE COURT: No, the hearing is over.

15 You can disconnect the phone.

16 MR. MOSS: Well --

17 THE COURT: Hold on. We do have one other issue.

18 I'm sorry; there is a discovery dispute in Moss.

19 MR. MOSS: Thank you.

20 THE COURT: Mr. Moss, Mr. -- do you want to address
21 the issue of discovery?

22 MR. WISHNEW: Sure.

23 MR. MOSS: I do.

24 THE COURT: Go ahead.

25 MR. MOSS: I appreciate the opportunity.

1 THE COURT: Go ahead.

2 MR. MOSS: I -- the trust has put forward to the Court
3 evidence that is only contained in the records of ResCap. They
4 have no provided any evidence from the file to the ETS, and I
5 think it is fundamentally unfair that that is the case. This
6 action is against ETS, and if I have a claim, it is against
7 ETS.

8 THE COURT: Well, you don't get to do discovery to
9 determine whether you have a claim. You have to properly state
10 a claim to be able to get discovery. I permitted you to get
11 some discovery, but the standard is not -- you don't get to
12 take your discovery and then decide whether you can properly
13 state a claim.

14 Mr. Wishnew, you want to address the issue?

15 MR. MOSS: I'm --

16 MR. WISHNEW: I think Your Honor has pretty much
17 stated our position that you don't get discovery to be able to
18 plead a good claim. And frankly, the matter is Mr. Moss had
19 the opportunity to proffer facts to substantiate actual malice.
20 He hasn't done that. He isn't going to take -- only if Your
21 Honor feels that he's made that pleading, then he can get
22 discovery.

23 THE COURT: All right. The matter's taken under
24 submission.

25 This hearing is adjourned.

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You can disconnect the telephone.

All right. We'll -- the Court will resume at 11 a.m.
(Whereupon these proceedings were concluded at 10:51 AM)

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I N D E X

RULINGS

	PAGE	LINE
The ResCap Borrower Claims Trust's	13	17
eighty-seventh omnibus objection to claims		
is sustained as to all claims other than		
Leonhardt and Unciano		

C E R T I F I C A T I O N

I, Aliza Chodoff, certify that the foregoing transcript is a true and accurate record of the proceedings.



ALIZA CHODOFF

AAERT Certified Electronic Transcriber CET**D-634

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Date: June 24, 2015